

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	CG Docket No. 02-278
Petition for Waiver of	)	
Papa Murphy's Holdings, Inc. and	)	
Papa Murphy's International LLC	)	
_____	)	

**DECLARATION OF ANTHONY TODARO IN SUPPORT OF  
RESPONSE TO PETITION FOR RECONSIDERATION OF  
RETROACTIVE WAIVER TO PAPA MURPHY'S HOLDINGS, INC.  
AND PAPA MURPHY'S INTERNATIONAL L.L.C.**

I, Anthony Todaro, declare as follows:

1. I am an attorney licensed to practice law in the State of Washington. I am an attorney representing Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. (collectively, "Papa Murphy's"). I have personal knowledge of the matters set forth below, and can competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Commission's October 14, 2016 order granting limited waivers of the Commission's rules regarding prior express consent to receive text messages.

3. Attached hereto as **Exhibit B** is a true and correct copy of Defendants' Motion Summary Judgment, which Papa Murphy's filed in federal district court litigation on October 20, 2016.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Seattle, Washington this 23rd day of November, 2016.

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# EXHIBIT A

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petitions for Waiver and/or Retroactive Waiver of	)	
47 CFR Section 64.1200(a)(2) Regarding the	)	
Commission's Prior Express Written Consent	)	
Requirement	)	

**ORDER**

**Adopted: October 14, 2016**

**Released: October 14, 2016**

By the Chief, Consumer and Governmental Affairs Bureau:

**I. INTRODUCTION**

1. In this order, we grant limited waivers of the Commission's prior-express-written-consent rules to seven petitioners in light of confusion about the rule and consistent with the Commission's grant of similar waivers.<sup>1</sup> Specifically, we find good cause exists to find that the instant petitioners needed additional time to obtain updated written consent in compliance with the Commission's 2012 rule changes, which were adopted under the Telephone Consumer Protection Act (TCPA)<sup>2</sup> to ensure that

<sup>1</sup> See *Petition for Expedited Declaratory Ruling or Forbearance*, CG Docket No. 02-278, filed by Mammoth Mountain Ski Area, LLC (filed Feb. 23, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001019587> (*Mammoth Petition*); *Petition of Kale Realty, LLC for Retroactive Waiver of 47 CFR § 64.1200(a)(2)*, CG Docket No. 02-278 (filed July 23, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001094590> (*Kale Petition*); *Petition of F-19 Holdings, LLC, and All Affiliated Franchisees for Retroactive Waiver of 47 U.S.C. § 227*, CG Docket No. 02-278 (filed July 29, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001096041> (*F-19 Holdings Petition*); *National Association of Broadcasters Petition for Retroactive Waiver*, CG Docket No. 02-278 (filed Aug. 18, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001097932> (*NAB Petition*); *National Cable & Telecommunications Association Petition for Waiver*, CG Docket No. 02-278 (filed Oct. 1, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001301151> (*NCTA Petition*); *Petition for Retroactive Waiver filed by Rita's Water Ice*, CG Docket No. 02-278 (filed Dec. 2, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001320950> (*RWI Petition*); *Petition for Waiver filed by Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C.*, CG Docket No. 02-278 (filed on Feb. 22, 2016), <http://appsint.fcc.gov/ecfs/comment/view?id=60001488035> (*Papa Murphy's Petition*); see also Letter from Angela Giancarlo, counsel for Mammoth Mountain Ski Area, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-3 (filed Dec. 10, 2015), <http://appsint.fcc.gov/ecfs/comment/view?id=60001326361> (*Mammoth Ex Parte*) (supplementing its petition and requesting as alternative relief that the Commission grant it the same retroactive waiver granted to certain other petitioners in the *2015 TCPA Declaratory Ruling*).

<sup>2</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The Commission's implementing rules are codified as 47 CFR § 64.1200.

telemarketers have proof of consent from consumers to make robocalls. We emphasize that these seven petitioners should already be in full compliance with the Commission's requirements for any calls made 90 days or more after the Commission's 2015 clarification of the written-consent rules because they had the benefit of that clarification in making such calls.

## II. BACKGROUND

### A. The Telephone Consumer Protection Act and Commission's Rules

2. In 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and other calling practices that can be an invasion of consumer privacy. Before the Commission's 2012 revisions, the Commission's implementing rules, in relevant part, prohibited: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent;<sup>3</sup> and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent.<sup>4</sup> The consent could be provided in either oral or written form.<sup>5</sup>

3. In 2012, the Commission made its rules consistent with the Federal Trade Commission's (FTC) parallel rules by requiring, among other things, prior express *written* consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for all prerecorded telemarketing calls to residential lines.<sup>6</sup> Additionally, the Commission required that any request for a consumer's written consent to receive telemarketing robocalls must include the telephone number to which the consumer authorizes such telemarketing messages to be delivered, and clear and conspicuous disclosures informing the consumer that: (1) the consumer authorizes the seller to deliver telemarketing calls to that number using an automatic telephone dialing system or an artificial or prerecorded voice; and (2) agrees to provide such written consent without being required, directly or indirectly, to provide written consent as a condition of purchasing any property, goods or services.<sup>7</sup> The 2012 rule changes became effective on October 16, 2013.<sup>8</sup>

4. Immediately after the effective date of the 2012 rule changes, two parties, the Direct Marketing Association (DMA) and the Coalition of Mobile Engagement Providers (Coalition), filed petitions asking the Commission, respectively, to forbear from enforcing the new written consent requirements when noncompliant written consent had already been obtained and to clarify that the revised rules did not nullify noncompliant written consent (*i.e.*, consent that did not meet the new 2012 requirements) obtained prior to the effective date of the revised rules.<sup>9</sup> NAB, a petitioner here, points out that in the DMA/Coalition proceeding it filed comments in support of the kind of waiver it is seeking here, "where consumers had previously provided prior express consent in writing under the old TCPA rules."<sup>10</sup> NCTA, another petitioner here, also actively participated in that DMA/Coalition proceeding.<sup>11</sup>

<sup>3</sup> See 47 CFR § 64.1200(a)(2) (2011).

<sup>4</sup> See 47 CFR § 64.1200(a)(1) (2011). This restriction also applied to such calls directed to emergency numbers and other specified locations.

<sup>5</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1833, para. 7 (2012) (*2012 TCPA Order*).

<sup>6</sup> *Id.* at 1838, para. 20.

<sup>7</sup> 47 CFR § 64.1200(f)(8); see also *2012 TCPA Order*, 27 FCC Rcd at 1844, para. 33.

<sup>8</sup> See 77 Fed. Reg. 63240 (Oct. 16, 2012).

<sup>9</sup> See *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8012-13, para. 98.

<sup>10</sup> *NAB Petition* at 2 & n.8 (quoting prior NAB comments).

5. In its *2015 TCPA Declaratory Ruling*, the Commission clarified the application of the 2012 rule change, saying that the new requirements apply “*per call* and ... telemarketers should not rely on a consumer’s written consent obtained before the 2012 rules took effect.”<sup>12</sup> Addressing these petitions in the *2015 TCPA Declaratory Ruling*, the Commission recognized that special circumstances warranted a deviation from strict enforcement of the revised prior-express-written-consent rules. It therefore provided the two petitioners -- and their members -- with temporary relief by granting retroactive waivers to those parties that allowed them to rely on old written consents for a limited period of time. During that time, the petitioners did not have to obtain new consent after making the required disclosures from these same consumers.<sup>13</sup> In reaching its decision, the Commission concluded that there was evidence in the record that petitioners could have been confused as to whether written consent obtained previously would remain valid after the new rules became effective. The Commission therefore found it reasonable to recognize a limited period of time within which the parties could be expected to obtain the prior express written consent as required by the 2012 rules, including the necessary disclosures.<sup>14</sup> Consequently, the Commission granted the petitioners and their members a retroactive waiver from the original effective date of the rules, October 16, 2013, to release date of the *2015 TCPA Declaratory Ruling* (which was July 10, 2015), and then a waiver from the release date of the *2015 TCPA Declaratory Ruling* through a period of 89 days (or until October 7, 2015), during which the affected parties were allowed to rely on the “old” prior express written consents already provided by their consumers before October 16, 2013.<sup>15</sup> After October 7, 2015, the petitioners and their members were required to be in full compliance with the Commission’s requirements for each subject call.<sup>16</sup>

## B. The Petitions

6. Since the release of the Commission’s *2015 TCPA Declaratory Ruling*, seven additional parties have filed petitions seeking similar waivers of the 2012 rule.<sup>17</sup> In general, the petitioners contend they are similarly situated to the petitioners who received waivers in the *2015 TCPA Declaratory Ruling*.<sup>18</sup> Specifically, they assert that, like the original petitioners granted relief in 2015, they faced similar confusion and needed additional time to obtain new consents under the 2012 rules without running the risk of being subject to litigation.<sup>19</sup> They also contend they would benefit from the added clarity provided by the earlier waiver decision and from the same additional time granted for compliance with the 2012 prior-written-consent requirements.<sup>20</sup>

(...continued from previous page)

<sup>11</sup> See *NCTA Petition* at 2.

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8014, para. 100 (2015) (*2015 TCPA Declaratory Ruling*).

<sup>13</sup> *Id.* at 8014, para. 100; 47 CFR §§ 64.1200(a)(2), (f)(8); see also *id.* § 64.1200(a)(1)(iii); *2012 TCPA Order*, 27 FCC Rcd at 1843-44, paras. 32-33; *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8012-15, paras. 98-102.

<sup>14</sup> *Id.* at 8014, para. 101.

<sup>15</sup> *Id.* at 8014-15, para. 102.

<sup>16</sup> *Id.*

<sup>17</sup> See *supra* note 1.

<sup>18</sup> See *F-19 Holdings Petition* at 1-2; *Kale Petition* at 1, 3; *Mammoth Ex Parte* at 1-2, 3; *NAB Petition* at 3; *NCTA Petition* at 2; *Papa Murphy’s Petition* at 5-6; *RWI Petition* at 2, 6.

<sup>19</sup> *F-19 Holdings* at 1-2, 3-4; *Kale Petition* at 2-3; *Mammoth Ex Parte* at 3; *NAB Petition* at 2-3; *NCTA Petition* at 3; *Papa Murphy’s Petition* at 5; *RWI Petition* at 4, 6.

<sup>20</sup> *F-19 Holdings Petition* at 5; *NCTA Petition* at 3; *Papa Murphy’s Petition* at 6; *RWI Petition* at 6-7.

7. The Commission sought comment on the petitions.<sup>21</sup> Individual and corporate consumers filed comments in support of and opposition to the petitions.<sup>22</sup> Commenters who support the petitions urge us to grant some form of relief.<sup>23</sup> Some commenters specifically support waivers for the petitioners.<sup>24</sup> A few supporting commenters also urge us to grant broader relief, such as granting a blanket waiver to all affected parties<sup>25</sup> or extending a waiver to any party to the 2012 proceeding.<sup>26</sup>

8. Opponents of the petitions generally argue that the current petitioners are not similarly situated to the initial waiver recipients because: (1) they have not established and/or cannot establish that they have received even noncompliant prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for all prerecorded telemarketing calls to residential lines;<sup>27</sup> (2) they offer no evidence to demonstrate they were in fact confused by the 2012 rules;<sup>28</sup> (3) they seek a

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<sup>21</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling or Forbearance from Mammoth Mountain Ski Area, LLC*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 2087 (CGB 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions for Retroactive Waiver Filed By the National Association of Broadcasters, F-19 Holdings, LLC, and Kale Realty, LLC*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 10207 (CGB 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Waiver Filed By the National Cable and Telecommunications Association*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 12337 (CGB 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed By Rita's Water Ice Franchise Company, LLC*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 14153 (CGB 2015); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed By Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C.*, CG Docket No. 02-278, Public Notice, 31 FCC Rcd 2118 (CGB 2016).

<sup>22</sup> A list of commenters can be found at Appendix A. There were no comments filed on three of the petitions (F-19 Holdings, NCTA, and RWI) and only comments filed in support of the *NAB Petition*. There was an opposition filed by Lennartson on the *Papa Murphy's Petition* and a late-filed opposition filed by Payton on the *Kale Petition*. There was also an *ex parte* filing styled as a Comment in Opposition filed on January 20, 2016 in response to the *Mammoth Ex Parte*. See Letter from David Zelenski, counsel for Paul Story, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Jan. 20, 2016), <http://appsint.fcc.gov/ecfs/comment/view?id=60001380421> (*Story Ex Parte*). We address the issues raised in the comments, oppositions, and *Story Ex Parte infra*.

<sup>23</sup> See Chamber Comments on the *Mammoth Petition* at 1-3, 6; CCIA Comments on the *Mammoth Petition* at 1-2, 6; Infocision Reply Comments on the *Mammoth Petition* at 1, 4; NCTA Comments on the *NAB Petition* at 1, 3-4; JB Comments on the *NAB Petition* at 1, 3-4. Although the three supporting commenters on the *Mammoth Petition* filed their comments in support of Mammoth's original request for a declaratory ruling, we find that their comments in favor of granting a declaratory ruling also equally support Mammoth's request for alternate retroactive waiver relief.

<sup>24</sup> NCTA Comments on the *NAB Petition* at 3-4; JB Comments on the *NAB Petition* at 4.

<sup>25</sup> See, e.g., NCTA Comments on the *NAB Petition* at 1-3.

<sup>26</sup> See, e.g., JB Comments on the *NAB Petition* at 2-3; see also *NAB Petition* at 3-4. Some supporting commenters also request that we find that the companies are not required to obtain new "prior express written consent" from their customers if the customer's prior express consent was previously provided under the rules then in effect. Chamber Comments on the *Mammoth Petition* at 1-3, CCIA Comments on the *Mammoth Petition* at 6; Infocision Reply Comments on the *Mammoth Petition* at 1-2; NCTA Comments on the *NAB Petition* at 1-3; JB Comments on the *NAB Petition* at 2-3. The Commission has already rejected the latter relief. *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014-15, paras. 99-102.

<sup>27</sup> Lennartson Opposition to the *Papa Murphy's Petition* at 3-4; Payton Opposition to the *Kale Petition* at 1, 5; Shields Comments on the *Mammoth Petition* at 2.

<sup>28</sup> Lennartson Opposition to the *Papa Murphy's Petition* at 4-6; *Story Ex Parte* on the *Mammoth Petition* at 2-3. Additionally, in the event the Commission is inclined to entertain Papa Murphy's request for a retroactive waiver, Lennartson requests that the Commission either stay a ruling on the request until discovery occurs in the underlying litigation or grant discovery to allow Lennartson to investigate whether Papa Murphy's was in fact confused. Lennartson Opposition to the *Papa Murphy's Petition* at 7. We address this request *infra*.

retroactive rule change which the Commission cannot grant because it may only implement a rule change on a “going-forward basis, not retroactively”;<sup>29</sup> (4) they seek to create a blanket exemption from the prior-express-written-consent requirements;<sup>30</sup> (5) they seek relief only because they have been sued for violating the TCPA;<sup>31</sup> and (6) they seek an extension of an extension in that they seek more time to comply after the Commission already granted parties relief by delaying implementation of its new rule until October 16, 2013.<sup>32</sup>

9. In response to these arguments, Mammoth and Papa Murphy’s assert that they received valid prior express consent from the called parties.<sup>33</sup> Further, Papa Murphy’s asserts that it would not be equitable to require a detailed factual finding that it was in fact “confused” and that such a requirement would run counter to the logic of the Commission’s 2015 order.<sup>34</sup> In rejecting the argument it is seeking a retroactive rule change, Mammoth states that it is not seeking a retroactive rule change because it is only seeking a clarification of the meaning of the 2012 order<sup>35</sup> and that it should be entitled to the same waiver relief previously granted to the initial waiver recipients.<sup>36</sup>

### III. DISCUSSION

10. In this Order, we grant waivers to F-19 Holdings, LLC; Kale Realty, LLC; Mammoth Mountain Ski Area, LLC; the National Association of Broadcasters and their members; the National Cable & Telecommunications Association and their members; Papa Murphy’s Holdings, Inc. and Papa Murphy’s International L.L.C.; and Rita’s Water Ice Franchise Company, LLC. These petitioners have demonstrated that they are similarly situated to petitioners previously granted relief in the *2015 TCPA Declaratory Ruling*. Specifically, we find good cause exists to grant individual retroactive waivers of section 64.1200(a)(2) of the Commission’s rules to the extent described below. We emphasize that these waivers do not apply to calls made after October 7, 2015. Thus, after October 7, 2015, we find that each petitioner and, as relevant, its members should have been in full compliance with the Commission’s rules for each subject call or it will be subject to any factually warranted Commission enforcement and TCPA liability. We also take this opportunity to remind petitioners and other callers that the Commission previously clarified that its prior-express-written-consent requirements apply *per call* (not per consumer) and that telemarketers should not rely on a consumer’s written consent obtained before the current rule took effect if that consent does not satisfy the current rule.<sup>37</sup>

11. The Commission may waive its rules for good cause shown.<sup>38</sup> A waiver may be granted if: (1) the waiver would better serve the public interest than would application of the rule; and (2) special circumstances warrant a deviation from the general rule.<sup>39</sup> Generally, the Commission or this Bureau,

<sup>29</sup> Shields Comments on the *Mammoth Petition* at 1-2.

<sup>30</sup> Shields Comments on the *Mammoth Petition* at 5.

<sup>31</sup> Lennartson Opposition to the *Papa Murphy’s Petition* at 2, 6-7; Shields Comments on the *Mammoth Petition* at 1, 5; Shields Reply Comments on the *Mammoth Petition* at 2; *see also Story Ex Parte* on the *Mammoth Petition* at 1-2.

<sup>32</sup> Payton Opposition to the *Kale Petition* at 1.

<sup>33</sup> *Mammoth Ex Parte* at 2; Papa Murphy’s Reply Comments at 4.

<sup>34</sup> Papa Murphy’s Reply Comments at 4.

<sup>35</sup> Mammoth Reply Comments at 5-6.

<sup>36</sup> *Mammoth Ex Parte* at 2-3.

<sup>37</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 100.

<sup>38</sup> 47 CFR § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>39</sup> *Northeast Cellular*, 897 F.2d at 1166.



through properly exercised delegated authority, may grant a waiver of the Commission's rules if the relief requested would not undermine the policy objectives of the rule in question, and would otherwise serve the public interest.<sup>40</sup> For the reasons discussed below, we find that the public interest is better served by granting limited retroactive waivers. Because we grant Mammoth's alternative request for retroactive waiver relief, we do not address the merits of its other requests or the record related to those other requests.<sup>41</sup> In sum, we find that good cause exists to grant retroactive waivers to all seven of the petitioners on the same terms provided in the *2015 TCPA Declaratory Ruling* and, as applicable, to their members.

12. The Commission previously found, in the *2015 TCPA Declaratory Ruling*, that special circumstances warranted deviation from the general rule at issue. Specifically, the Commission acknowledged confusion about the 2012 written-consent rules and granted petitioners waiver relief for a limited period within which they could obtain the prior express written consent required by the 2012 rule.<sup>42</sup> The Commission found that language in the 2012 order could reasonably have been interpreted by the petitioners to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule.<sup>43</sup> For the same reasons that the Commission cited in previously granting relief,<sup>44</sup> we believe it is also reasonable to recognize a limited period within which each of these petitioners could be expected to obtain the prior express written consent required by the Commission's current rules. We find that the seven petitioners before us have adequately demonstrated that they are similarly situated to the initial waiver recipients,<sup>45</sup> and should receive similar limited waivers for the same period, *i.e.*, up to October 7, 2015.

13. As some commenters observe, the Commission granted waivers to petitioners who demonstrated their confusion as to certain language in the Commission's 2012 order.<sup>46</sup> Each of the petitioners cites the same language from the 2012 order that the Commission later found reasonably caused confusion,<sup>47</sup> and there is no evidence in the record that refutes their claimed confusion. Moreover, all seven of the petitioners reference the language in the Commission's 2012 order that may have led to the confusion.<sup>48</sup> We find the seven petitioners have sufficiently demonstrated they incorrectly but reasonably interpreted the Commission's order to mean that their old written consents would remain valid after the new rules went into effect on October 16, 2013.<sup>49</sup> Because we find they are similarly situated to the prior waiver recipients, we find that good cause exists to grant the seven petitioners retroactive

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<sup>40</sup> *WAIT Radio v. FCC*, 418 F.2d at 1157.

<sup>41</sup> See *supra* note 1.

<sup>42</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 101.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 8014-15, paras. 100-102.

<sup>45</sup> See, e.g., *supra* note 18. The Petitioners assert that there was industry-wide confusion after the new rule went into effect as to whether prior express consent obtained previously would remain valid and stated they needed more time to obtain those new consents under the new rule without running the risk of being subject to litigation. See *supra* at note 19. They also contend they would benefit from the added clarity granted by the retroactive waiver. See *supra* at note 20.

<sup>46</sup> See, e.g., NCTA Comments on the *NAB Petition* at 2; JB Comments on the *NAB Petition* at 3-4.

<sup>47</sup> See *F-19 Holdings Petition* at 2, 5; *Kale Petition* at 2; *Mammoth Ex Parte* at 3; *NAB Petition* at 2; *NCTA Petition* at 1, 3; *Papa Murphy's Petition* at 5-6; *RWI Petition* at 7.

<sup>48</sup> See *F-19 Holdings Petition* at 2, 5; *Kale Petition* at 2; *Mammoth Ex Parte* at 2-3; *NAB Petition* at 2; *NCTA Petition* at 1, 3; *Papa Murphy's Petition* at 1, 4; *RWI Petition* at 3.

<sup>49</sup> See *F-19 Holdings Petition* at 2, 5; *Kale Petition* at 2; *Mammoth Ex Parte* at 3; *NAB Petition* at 2; *NCTA Petition* at 1, 3; *Papa Murphy's Petition* at 5-6; *RWI Petition* at 7.

waivers of Section 64.1200(a)(2) of the Commission's rules from October 16, 2013 through October 7, 2015.

14. Of the seven petitions, four are not opposed by commenters.<sup>50</sup> Of the remaining three petitions (Kale, Mammoth, and Papa Murphy's), opponents argue that the petitioners are not similarly situated to the prior waiver recipients. More specifically, opponents assert the following: petitioners have not established and/or cannot establish that they have received the prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and for all prerecorded telemarketing calls to residential lines;<sup>51</sup> petitioners provided no evidence to demonstrate they were in fact confused by the new rule;<sup>52</sup> petitioners seek a retroactive rule change which the Commission cannot grant;<sup>53</sup> petitioners seek to create a blanket exemption from the prior-express-written-consent requirement of the TCPA;<sup>54</sup> petitioners seek relief only because they have been sued for violating the TCPA;<sup>55</sup> and/or petitioners are seeking an unreasonable extension of time, which is in essence "an extension of an extension" in that they seek more time to comply after the Commission already granted parties relief by delaying the effective date of its new rule until October 16, 2013.<sup>56</sup> We address each argument in turn and find that none merit denying the requested waivers.

15. First, we find a detailed factual analysis unnecessary and not required to determine whether the petitioners had actually obtained written consent prior to seeking a waiver.<sup>57</sup> In the *2015 Declaratory Ruling*, the Commission acknowledged evidence of apparent confusion on the part of the petitioners and, therefore, found it reasonable to recognize a limited period within which they could be expected to obtain the prior express written consent required by its recently effective rule.<sup>58</sup> Here, petitioners all claim that they are similarly situated, and seek the same relief. The Commission did not undertake a review of the written consent obtained earlier by waiver recipients, and we decline to do so here. Rather, for the same reasons, we find it likewise reasonable to offer them the same relief the Commission previously provided the waiver recipients. We emphasize, however, that the waivers granted here only apply to calls for which some form of *written* consent had previously been obtained. Nothing in the Commission's 2015 decision suggested that parties could reasonably have been confused about the requirement that the consent in question had to be *written*, and the Commission was specific in that

<sup>50</sup> As noted *supra* in note 22, there were no comments filed on the F-19 Holdings, NCTA, and RWI petitions and only comments filed in support of the *NAB Petition*. See Appendix A.

<sup>51</sup> Lennartson Opposition to the *Papa Murphy's Petition* at 3-4; Payton Opposition to the *Kale Petition* at 1, 5; Shields Comments on the *Mammoth Petition* at 2.

<sup>52</sup> Lennartson Opposition to the *Papa Murphy's Petition* at 5-6; *Story Ex Parte* on the *Mammoth Petition* at 2-3.

<sup>53</sup> Shields Comments on the *Mammoth Petition* at 1; Shields Reply Comments on the *Mammoth Petition* at 1.

<sup>54</sup> Shields Comments on the *Mammoth Petition* at 5.

<sup>55</sup> Lennartson Opposition to the *Papa Murphy's Petition* at 2, 6-7; Shields Comments on the *Mammoth Petition* at 1, 5; Shields Reply Comments on the *Mammoth Petition* at 2; see also *Story Ex Parte* on the *Mammoth Petition* at 1-2.

<sup>56</sup> Payton Opposition to the *Kale Petition* at 1.

<sup>57</sup> We also decline to conduct a factual analysis to determine the exact scope and nature of consent as requested by Lennartson, Payton and Story. See Lennartson Opposition to the *Papa Murphy's Petition* at 7 (requesting discovery to allow it to determine whether Papa Murphy's was in fact confused); Payton Opposition to the *Kale Petition* at 5-6; *Story Ex Parte* on the *Mammoth Petition* at 3-4. We note that on this point Mammoth and Papa Murphy's contend they had the required consent. See Mammoth Reply Comments at 5-6; *Mammoth Ex Parte* at 2-3; *Papa Murphy's Petition* at 2-3; Papa Murphy's Reply Comments at 4.

<sup>58</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 101.

regard.<sup>59</sup> We also note that the petitioners there specified that they were requesting clarification only about whether they could continue to rely on previously obtained *written* consent.<sup>60</sup>

16. We also reject arguments that the Commission made proof of confusion a requirement to obtain a waiver. In addressing that argument, Papa Murphy's asserts that it would not be equitable to require a detailed factual finding that it was in fact "confused" and that such a requirement would run counter to the logic of the Commission's 2015 order.<sup>61</sup> In the *2015 Declaratory Ruling*, the Commission did not require petitioners to plead specific, detailed grounds for individual confusion,<sup>62</sup> and we do not believe there is any basis for imposing that requirement on these parties who assert that they were similarly situated. All of the petitioners asserted their general confusion regarding the new rule, and there is no evidence in the record that petitioners there or here actually understood they were required to comply with the 2012 requirements but failed to do so. For the same reasons, we also decline to allow discovery in order for Lennartson to investigate whether Papa Murphy's was in fact confused or to grant Lennartson a stay until discovery occurs in the underlying litigation. Papa Murphy's has asserted its general confusion regarding the new rule. Based on the Commission's determination that parties could reasonably have been confused as to whether previously obtained written consent would remain valid, we find Papa Murphy's assertion sufficient.<sup>63</sup> On this point, in addressing Lennartson's request for discovery, Papa Murphy's contends that discovery would be misplaced, stating "it is unclear how discovery would help answer the question of whether the public interest would be served through granting a waiver."<sup>64</sup> We agree and decline to grant the discovery request or to stay this matter until discovery occurs in the underlying litigation. We note that discovery is not contemplated by our rules governing declaratory ruling or waiver proceedings.<sup>65</sup>

17. We also reject arguments that petitioners seek a retroactive rule change or a blanket exemption from the TCPA. Here we simply grant waivers for the same limited period of time (now expired) to a limited group of parties subject to the TCPA. The scope of the relief we grant is the same limited relief previously granted by the Commission.<sup>66</sup> In so doing, we deny some parties' request that we declare a blanket retroactive waiver for some limited set of parties.

18. Specifically, petitioner NAB expressly asks the Commission to declare that all parties to the proceeding are entitled to the same retrospective and prospective waivers as articulated in the *2015 TCPA Declaratory Ruling*.<sup>67</sup> Similarly, commenter JB requests that the Commission grant the same waiver relief granted to the 2015 waiver recipients to any other party to the proceeding, including parties who comment on the instant NAB waiver petition.<sup>68</sup> Seeking to extend relief to a broader category, petitioner NCTA requests that the Commission grant a blanket waiver to all entities subject to TCPA

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<sup>59</sup> See *id.* (We agree with Coalition that [the language from the 2012 order] could have reasonably been interpreted to mean that *written consent* obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule") (emphasis added).

<sup>60</sup> See *id.* at 8012-13, para. 98.

<sup>61</sup> Papa Murphy's Reply Comments at 4.

<sup>62</sup> See generally *id.* at 8014-15, paras. 100-102.

<sup>63</sup> See Papa Murphy's Reply Comments at 3-4.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> 47 CFR §§ 1.2, 1.3.

<sup>66</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014-15, para. 102.

<sup>67</sup> *NAB Petition* at 3-4.

<sup>68</sup> JB Comments on the *NAB Petition* at 3-4.

obligations,<sup>69</sup> which it contends would provide all entities sufficient time to comply with the prior express written consent requirement and enable them to better defend claims and avoid costly litigation.<sup>70</sup> Rather than grant the blanket relief requested by those parties, we will address petitions for retroactive waiver of the Commission's prior-express-written-consent rule on a case-by-case basis, as we are already doing. Should other parties request waivers for the same reason, we will address them as warranted.

19. Turning to the argument that petitioners seek relief only because they have been sued for violating the TCPA, we note that the Commission, in granting the waiver relief it provided in 2015, did acknowledge NAB's argument at the time that granting limited prospective relief would have a bearing on such litigation.<sup>71</sup> But the essential basis for the relief provided under our rules was the "uncertainty" of the Commission's 2012 language, the "confusion" resulting therefrom, and the conclusion that it was "reasonable to recognize a limited period within which [petitioners there] could be expected to obtain the prior express written consent required by our recently effective rule."<sup>72</sup> Finally we reject arguments that petitioners are unreasonable in seeking a further extension of time by virtue of the instant waiver petitions. Commenters opposing the original waiver recipients' requests also contended that no further relief was warranted, arguing at that time that the petitioners had had an ample period of time to transition—in fact, they argued they already had an extended implementation period of over 16 months that the Commission allowed for compliance with its new prior-express-written-consent requirements.<sup>73</sup> In granting the waiver relief requested, the Commission rejected arguments that additional time was not warranted,<sup>74</sup> and we also reject them now. The waivers we grant here continue only until the date specified by the Commission when it granted the earlier waivers; as such, we are allowing no additional time beyond that here.

#### IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.2, 1.3, 64.1200 of the Commission's rules, 47 CFR §§ 1.2, 1.3, 64.1200, and pursuant to the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, that the Petition for Expedited Declaratory Ruling or Forbearance, filed and supplemented by Mammoth Mountain Ski Area, LLC in CG Docket No. 02-278 on February 23, 2015 and December 10, 2016 respectively, the Petition for Retroactive Waiver filed by Kale Realty, LLC in CG Docket No. 02-278 on July 23, 2015, the Petition for Retroactive Waiver of 47 U.S.C. Section 227 filed by F-19 Holdings, LLC and all Affiliated Franchisees in CG Docket No. 02-278 on July 29, 2015, the Petition for Retroactive Waiver filed by the National Association of Broadcasters and their members in CG Docket No. 02-278 on August 18, 2015, the Petition for Waiver filed by the National Cable & Telecommunications Association and their members in CG Docket No. 02-278 on October 1, 2015, the Petition for Retroactive Waiver filed by Rita's Water Ice Franchise Company, LLC in CG Docket No. 02-278 on October 1, 2015, and the Petition for Waiver filed by Papa Murphy's Holdings Inc. and Papa Murphy's International L.L.C. in CG Docket No. 02-278 on February 22, 2016, ARE GRANTED IN PART AND OTHERWISE DENIED to the extent indicated herein.

21. IT IS FURTHER ORDERED that this ORDER shall be effective upon release.

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<sup>69</sup> *NCTA Petition* at 1; *see also* NCTA Comments on the *NAB Petition* at 3.

<sup>70</sup> *NCTA Petition* at 1, 4; NCTA Comments on the *NAB Petition* at 3-4.

<sup>71</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8014, para. 102.

<sup>72</sup> *Id.* at 8014, paras. 100-01.

<sup>73</sup> *Id.* at 8014, para. 99.

<sup>74</sup> *Id.* at 8014-15, para. 102.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler  
Chief  
Consumer and Governmental Affairs Bureau

## Appendix A

### List of Commenters

The following parties filed comments in response to the various Public Notices issued in this matter (CG Docket 02-278):

<b><u>Commenter</u></b>	<b><u>Petition</u></b>	<b><u>Abbreviation</u></b>
Computer & Communications Industry Association	Mammoth	CCIA
<b>Infocision Management Corporation</b>	Mammoth	Infocision
Joe Shields*	Mammoth	Shields
John Lennartson	Papa Murphy's	Lennartson
Joint Broadcasters	NAB	JB
<b>Mammoth Mountain Ski Area, LLC</b>	Mammoth	Mammoth
National Cable & Telecommunications Association	NAB	NCTA
<b>Papa Murphy's Holdings, Inc. and Papa Murphy's International LLC</b>	Papa Murphy's	Papa Murphy's
Rusty Payton**	Kale	Payton
U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform	Mammoth	Chamber

\* filing both comments and reply comment (bold - reply comments only).

\*\*filing late-filed opposition.

# EXHIBIT B

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN LENNARTSON, on behalf of  
himself and all others similarly situated,

Plaintiff,

v.

PAPA MURPHY'S HOLDINGS, INC.;  
and PAPA MURPHY'S  
INTERNATIONAL L.L.C.,

Defendants.

No. 3:15-cv-05307-RBL

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:  
November 11, 2016



## I. INTRODUCTION

On October 14, 2016, the Federal Communications Commission (“FCC”) granted Papa Murphy’s Holdings, Inc. and Papa Murphy’s International L.L.C. (collectively, “Papa Murphy’s”) a waiver of the FCC’s prior written consent regulations for those text messages Papa Murphy’s sent to individuals who provided written consent prior to October 16, 2013. Plaintiff in the present case provided written consent to receive text messages from Papa Murphy’s on March 2, 2012—a fact he has never disputed. The FCC’s waiver thus invalidates plaintiff’s claim in its entirety, ending this case.

Plaintiff has always hinged his TCPA claim on a single allegation: that Papa Murphy’s did not provide certain technical disclosures on its website, making plaintiff’s written consent invalid and each subsequent text message he received from Papa Murphy’s violative only of the very requirement for which the FCC has now granted a waiver to Papa Murphy’s. These disclosures were mandated by the FCC through its rule-making process and were required to be made to people who signed up to receive text messages after October 16, 2013. Because, based on the FCC’s own orders, it was unclear whether these disclosures were required to be made to those individuals who had provided written consent *prior to* October 2013—such as plaintiff—Papa Murphy’s, along with other entities, petitioned FCC for a waiver of its rules for text messages sent to individuals who gave their written consent to receive text messages prior to October 2013. Pursuant to its power to waive its own rules for good cause shown—a power recognized by numerous courts—the FCC granted Papa Murphy’s requested waiver on October 14, 2016. Thus, the sole legal predicate for plaintiff’s claim has been eliminated by the administrative body that created that predicate.

Under this waiver, Papa Murphy’s cannot be liable for failing to provide the technical disclosures required for post-October 2013 opt-ins to those (such as plaintiff) who provided written consent prior to October 2013. Plaintiff’s TCPA claim must, therefore, be dismissed with prejudice.

## II. BACKGROUND

### A. The TCPA's Consent Requirement

The provision of the TCPA under which plaintiff brings his suit reads as follows:

It shall be unlawful ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1).

The statute does not define “prior express consent.” Before October 2013, the FCC defined “consent” broadly to include non-written forms of consent. *See In re Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8769 (Oct. 16, 1992) (“persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary”). In 2012, however, the FCC prospectively altered the consent requirement and stated that after October 16, 2013, companies were required to obtain written consent. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1838 (2012) (“we require prior express written consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines”).

The FCC made clear that this new written consent requirement would only apply after October 16, 2013. *Id.* at 1857 (stating that implementation period for new written consent requirement “will commence upon publication of OMB approval of our written consent rules in the Federal Register”). The FCC further stated that in order to obtain compliant written consent, entities had to disclose to potential recipients that text messages would come from an “automatic telephone dialing system or an artificial or prerecorded voice” and that a person did not have to consent to receive text messages in order to purchase goods or services. *Id.* at 1844.

1 In its 2012 order, the FCC also addressed the issue of whether written consents obtained  
2 prior to the October 2013 rule changes would remain valid. The FCC stated that they would.  
3 *Id.* (“Once our written consent rules become effective ... an entity will no longer be able to rely  
4 on non-written forms of express consent to make autodialed or prerecorded voice telemarketing  
5 calls, and thus could be liable for making such calls **absent prior written consent.**”) (emphasis  
6 added). The plain meaning of the FCC’s language is that post-October 2013, consent would  
7 have to adhere to the new requirements, but that, where “prior written consent” exists, the  
8 individual would be effectively grandfathered into the new scheme.

9 In its July 10, 2015 order, the FCC reversed course and stated that written consents  
10 obtained prior to the October 2013 rule changes had to contain the new mandated disclosures  
11 regarding use of “automatic telephone dialing systems” and consent not being a condition of  
12 purchase. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of*  
13 *1991*, 30 F.C.C. Rcd. 7961, 8014 (2015). In making this ruling, the FCC acknowledged that  
14 the language in its prior order that “‘an entity will no longer be able to rely on non-written  
15 forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus  
16 could be liable for making such calls absent prior written consent’ ... could have reasonably  
17 been interpreted to mean that written consent obtained prior to the current rule’s effective date  
18 would remain valid even if it does not satisfy the current rule.” *Id.* Based on this confusion,  
19 the FCC granted waivers to the petitioning entities for text messages sent to individuals who  
20 had provided written consent prior to the October 2013 rule changes. *See id.* at 8014–15 (“for  
21 good cause shown and the reasons discussed above, we grant Petitioners (including their  
22 members as of the release date of this Declaratory Ruling) a retroactive waiver from October  
23 16, 2013, to release of this Declaratory Ruling, and then a waiver from the release of the  
24 Declaratory Ruling through a period of 89 days following release of this Declaratory Ruling to  
25 allow Petitioners to rely on the ‘old’ prior express written consents already provided by their  
26 consumers before October 16, 2013 (the effective date of new requirement)”).

**B. Papa Murphy's sought and received a waiver of the FCC's prior written consent regulations.**

Because Papa Murphy's was in the same position as the petitioners that received waivers in the July 2015 FCC Order—*i.e.*, having received written consents from individuals prior to October 2013 rules changes—it petitioned the FCC for an identical waiver. *See* Dkt. No. 71, Ex. A. Mr. Lennartson filed with the FCC an objection to Papa Murphy's petition. *See* Dkt. No. 69, Ex. 1. On October 14, 2016, the FCC granted Papa Murphy's waiver petition, along with several other petitions seeking similar relief. Declaration of Anthony Todaro in Support of Defendants' Motion for Summary Judgment ("Todaro Decl.") Ex. A ¶ 1 ("In this order, we grant limited waivers of the Commission's prior-express-written-consent rules to seven petitioners in light of confusion about the rule and consistent with the Commission's grant of similar waivers.").

In its October 2016 order, the FCC found that "good cause exists to find that the instant petitioners needed additional time to obtain updated written consent in compliance with the Commission's 2012 rule changes." Todaro Decl. Ex. A ¶ 1. Specifically, the FCC stated "that good cause exists to grant the seven petitioners retroactive waivers of Section 64.1200(a)(2)<sup>1</sup> of the Commission's rules from October 16, 2013 through October 7, 2015."<sup>2</sup> *Id.* ¶ 13. As it did with its prior waivers, the FCC limited Papa Murphy's waiver to only those individuals who provided their written consent prior October 16, 2013 (because the confusion in the prior order related to consent obtained before the October 2013 rule change). *Id.* ¶ 15 ("the waivers

<sup>1</sup> 47 C.F.R. § 64.1200(a)(2) is the subsection requiring written consent to be obtained prior to sending text messages to cellular telephones using an autodialer. It reads in relevant part: "No person or entity may ... Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party ...."

<sup>2</sup> The FCC elected to grant Papa Murphy's a waiver for text messages sent through October 7, 2015 because that timeframe matches the waiver granted to the prior petitioners. Todaro Decl. ¶ 5 ("the Commission granted the petitioners and their members a retroactive waiver from the original effective date of the rules, October 16, 2013, to release date of the 2015 TCPA Declaratory Ruling (which was July 10, 2015), and then a waiver from the release date of the 2015 TCPA Declaratory Ruling through a period of 89 days (or until October 7, 2015), during which the affected parties were allowed to rely on the 'old' prior express written consents already provided by their consumers before October 16, 2013").

1 granted here only apply to calls for which some form of written consent had previously been  
 2 obtained”). Accordingly, under the FCC’s October 2016 order, Papa Murphy’s obtained a  
 3 waiver for text messages sent between October 16, 2013 and October 7, 2015 to those  
 4 individuals who provided their written consent (regardless of the disclosures associated with  
 5 that consent) prior to October 16, 2013. As detailed below, plaintiff, and the text messages he  
 6 received, fit squarely within this waiver.

7 **C. Plaintiff provided written consent on March 2, 2012 to receive text**  
 8 **messages from Papa Murphy’s.**

9 It is an undisputed fact that plaintiff signed up to receive text messages through Papa  
 10 Murphy’s website on March 2, 2012. Papa Murphy’s first detailed the conclusive evidence of  
 11 plaintiff’s written consent over a year ago in a prior motion for summary judgment. *See* Dkt.  
 12 No. 19 at 4:1–5:14. As set forth in that motion, and in the supporting declaration of Andrew  
 13 Brawley, on March 2, 2012, an individual submitted a request to receive text messages through  
 14 Papa Murphy’s website, which included the following information: Phone number:  
 15 “6126186664”; Last name: “Lennartson”; Zip code: “55406.” Dkt. No. 21 ¶¶ 7–8. Plaintiff’s  
 16 counsel has confirmed that plaintiff’s telephone number is indeed 6126186664. *See* Dkt.  
 17 No. 20, Ex. A.

18 Not surprisingly given the above evidence, plaintiff has never disputed that he signed up  
 19 to receive text messages through Papa Murphy’s website on March 2, 2012, thereby providing  
 20 his written consent.<sup>3</sup> Specifically, in response to Papa Murphy’s prior summary judgment  
 21 motion, plaintiff argued only that Papa Murphy’s website did not contain the technical  
 22 disclosures required to satisfy FCC’s post-October 2013 written consent standard—not that he  
 23 had failed to provide written consent. *See* Dkt. No. 24 (“There can be no dispute that  
 24 Defendants did not obtain consent from Plaintiff that fully satisfies the written consent

25 <sup>3</sup> The FCC has affirmatively stated that submissions through website forms, such as Papa Murphy’s, constitute  
 26 written consent. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27  
 F.C.C. Rcd. 1830, 1844 (2012) (“Consistent with the FTC, we now similarly conclude that consent obtained in  
 compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained  
 via an email, website form, text message, telephone keypress, or voice recording.”).

requirements in the 2012 Order.”). Indeed, plaintiff stated in his response that the “central issue before the Court is whether those written consent requirements [*i.e.*, the requirements regarding disclosures in connection with consent] apply in the first instance.” Dkt. No. 24 at 7:6–7. Moreover, since the briefing on the prior summary judgment motion, the issue of plaintiff’s written consent has arisen in parties’ Joint Status Report and the Motion to Stay briefing, and in both instances plaintiff never contested that he provided his written consent. *See* Dkt. No. 53 (addressing Papa Murphy’s FCC petition in Joint Status Report but not contesting he provided written consent); Dkt. No. 68 (addressing FCC motion at length in opposition to stay motion, but never claiming petition would not apply due lack of written consent). Plaintiff has never contested that he provided written consent to receive text messages in 2012; and he cannot do so now.<sup>4</sup>

**D. Plaintiff now seeks additional discovery, which is not germane to this motion.**

In response to Papa Murphy’s having shared the FCC ruling with plaintiff and having requested that plaintiff dismiss his claim, plaintiff, in an apparent attempt to delay this motion, responded by sending a notice of a Rule 30(b)(6) deposition listing 23 topics.

On October 14, 2016, Papa Murphy’s counsel informed plaintiff’s counsel that the FCC had granted its waiver petition. Papa Murphy’s counsel inquired whether plaintiff intended to pursue his lawsuit, given the FCC’s October 2016 order. *Todaro Decl.* ¶ 3. Papa Murphy’s counsel further informed plaintiff’s counsel that if plaintiff would not drop his suit, Papa Murphy’s would shortly move for summary judgment. *Id.* After being alerted to Papa Murphy’s forthcoming summary judgment motion, plaintiff served Papa Murphy’s with a Rule 30(b)(6) deposition notice on October 19. *Id.* In a transmittal email, plaintiff’s counsel stated that “the FCC Order requires us to take the 30(b)(6) deposition.” *Id.*

Contrary to plaintiff’s assertion, no further discovery is required to adjudicate the present motion. It is undisputed that plaintiff provided his written consent to receive text

<sup>4</sup> Following plaintiff’s filing of this lawsuit, Papa Murphy’s ceased sending text messages to plaintiff in June 2015. *See* Dkt. No. 21 (Brawley Decl.) ¶ 11. Plaintiff has never disputed this fact.

1 messages on March 2, 2012 and that Papa Murphy's has not sent text messages to plaintiff  
2 since June 2015. Plaintiff's proposed Rule 30(b)(6) deposition also does not appear aimed at  
3 refuting those facts. *See* Todaro Decl. Ex. B. There are no additional facts that are essential for  
4 plaintiff to oppose this motion.

5 Any attempt by plaintiff to re-litigate Papa Murphy's FCC petition in this forum would  
6 be misguided on multiple levels. The FCC, not this Court, has the power to waive its rules.  
7 *See* 47 C.F.R. § 1.3.

8 In April 2016, plaintiff filed with the FCC an objection to Papa Murphy's FCC petition  
9 and sought an allowance from the FCC to take discovery on Papa Murphy's waiver request.  
10 The FCC considered and rejected plaintiff's objection and request for discovery. Todaro Decl.  
11 Ex. A ¶ 16 ("We also decline to allow discovery in order for Lennartson to investigate whether  
12 Papa Murphy's was in fact confused or to grant Lennartson a stay until discovery occurs in the  
13 underlying litigation."). Papa Murphy's has requested a meet-and-confer and intends, if  
14 necessary, to seek a protective order in connection with plaintiff's deposition notice. Any  
15 attempt by plaintiff to use his last-minute, ill-conceived request for a corporate deposition to  
16 derail this motion should be rejected by the Court because, as explained above, the FCC waiver  
17 applies to Mr. Lennartson's circumstance and has the effect of eliminating his claims in this  
18 case.

### 19 III. ARGUMENT

20 This Court should exercise its gatekeeper function and dismiss Mr. Lennartson's claim.  
21 It is axiomatic that summary judgment is appropriate where "the movant shows that there is no  
22 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
23 law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Here,  
24 where the facts are not in dispute and the issue is entirely legal in character, resolution by  
25 summary judgment is unquestionably appropriate.



**A. The FCC has authority to waive its own regulations for good cause.**

Under 47 C.F.R. § 1.3, the FCC has power to waive any of its rules for good cause shown. *See* 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); *see also Nat’l Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 427 (D.C. Cir. 2009) (“the Commission has authority under its rules, *see* 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest, so long as it articulates identifiable standards for exercising that authority”). The FCC has expressly stated that its inherent power to waive its rules extends to situations in which waivers affect pending litigation:

Finally, we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have violate[d] the separation of powers vis-à-vis the judiciary, as one commenter has suggested. By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

*Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (2014) (internal quotations omitted) (citing *Ne. Cellular Tel. Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”). Courts have also held that the FCC may retroactively waive its own rules in the context of ongoing litigation. *See Simon v. Healthways, Inc.*, No. CV1408022BROJCX, 2015 WL 10015953, at \*7 (C.D. Cal. Dec. 17, 2015) (“The Court agrees with the Bureau’s conclusion that the FCC has the authority to grant such a retroactive waiver.”); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 14-CV-3232 (NSR), 2016 WL 1271693, at \*5 (S.D.N.Y. Mar. 29, 2016) (“it is within the FCC’s authority to determine when and how to apply this regulation, and to waive it for good cause”).



Here, the FCC waived one of its rules regarding particular disclosures that must accompany prior written consent. The TCPA's statutory provisions do not require such disclosures, much less written consent. *See* 47 U.S.C. § 227(b)(1). The FCC created the requirement that it now waives. No legal principle bars such action by a federal administrative agency. Accordingly, the FCC acted within its powers in granting Papa Murphy's a waiver of the prior express consent requirement that is the sole basis for plaintiff's claim.

**B. The text messages sent to plaintiff fit squarely within the FCC's waiver, invalidating plaintiff's TCPA claim.**

The FCC granted Papa Murphy's a waiver for text messages sent between October 16, 2013 and October 7, 2015, to those individuals who provided their written consent to receive text messages prior October 16, 2013. *See supra* at II.B. Plaintiff provided his written consent to receive text messages from Papa Murphy's on March 2, 2012, and he did not receive text messages from Papa Murphy's after June 2015. Accordingly, plaintiff (by virtue of providing his written consent in 2012) and the text messages he received (because he did not receive text messages after October 7, 2015) fall directly within the FCC's properly granted waiver.

**IV. CONCLUSION**

For all of the foregoing reasons, plaintiff's claim should be dismissed with prejudice.

Respectfully submitted this 20th day of October, 2016.

DLA PIPER LLP (US)

s/ Anthony Todaro

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Anthony Todaro  
Anthony Todaro, WSBA No. 30391

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